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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 473

JACK AKERS AND CLARA M. AKERS,
a partnership, doing business in the form and name of
Akers Cleaners,
Petitioners,

v.

HAROLD W. HANDLEY,
Governor of the State of Indiana, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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OPINION BELOW

The opinion, decision and judgment of the Indiana Supreme Court, as yet unreported officially, is unofficially reported in 149 N. E. (2d) 692 of the West Reporter System and is fully and correctly reproduced in the Appendix to petitioners' Petition for Writ of Certiorari. (pp. 9-12.)

JURISDICTION

The question sought to be presented by petitioners is based upon alleged conflict of a State statute with the Thirteenth Amendment to the United States Constitution, which said federal question, though believed to be not substantial under the facts herein, has been presented by petitioners at every stage of the proceedings in this case.

QUESTIONS PRESENTED

There is but one basic question here presented, to-wit:

Do the withholding provisions of the Indiana Gross Income Tax Act, being the Indiana Acts of 1957, Chapter 302 [Burns' Indiana Statutes Annotated (1957 Pocket Supplement) Section 64-2617] impose involuntary servitude in violation of the Thirteenth Amendment to the United States Constitution?

STATUTE INVOLVED

Although Rule 23(1)(d) of this Court explicitly requires the Petition for Writ of Certiorari to contain "(d) The constitutional provisions, treaties, statutes, ordinances, or regulations which the case involves, setting them out verbatim, * * * " and notwithstanding that petitioners' sole claim is the alleged invalidity of the Indiana Acts of 1957, Chapter 302, at no place in their petition is the pertinent text of the Indiana statute or any part thereof set forth verbatim.

The statute involved is the Indiana Acts of 1957, Chapter 302 [Burns' Indiana Statutes Annotated (1957 Pocket Supplement), Section 64-2617], commonly known as the Gross Income Tax Withholding Act of 1957. This is not an independent statute, but is amendatory of Section 17 of

the Indiana Gross Income Tax Law, by which a tax withholding system more comprehensive than formerly provided is now required.

To supply this void in petitioners' Petition for Writ of Certiorari and further, because respondents do not accept petitioners' interpretation as to what said Act requires, the said Gross Income Tax Withholding Act of 1957 is set forth verbatim in the Appendix to this brief.

STATEMENT OF THE CASE

This case arose by the filing of a complaint by petitioners, by which they sought injunctive relief to enjoin the respondents, who are members of the Indiana Revenue Board and the Indiana Commissioner of Revenue, from enforcing the provisions of the Indiana Acts of 1957, Chapter 302, commonly known as the Gross Income Tax Withholding Act of 1957. Originally, as indicated in petitioners' complaint as filed in the trial Court, petitioners were claiming said Act to be violative of a number of constitutional provisions, both Federal and State, but prior to appeal to the Indiana Supreme Court waived all questions except the one claim that said Act violates the involuntary servitude provision of the Thirteenth Amendment to the United States Constitution; the abandonment of all other questions was expressly admitted in oral argument before the Indiana Supreme Court.

Prior thereto and in the hearing before the trial Court (which was prior to the effective date of the Act) the following facts were adduced by uncontroverted evidence.

Petitioners are a partnership having control of the payment of wages, thus being a "withholding agent" within

the statutory definition of that term as defined in Section 1(l) of the Gross Income Tax Act, as amended, being the Indiana Acts of 1957, Chapter 315, Section 1(l) [Burns' Indiana Statutes Annotated (1957 Pocket Supplement) Section 64-2601(l)].

Petitioners employ five persons to whom wages are paid, which income is subject to the tax imposed by the Indiana Gross Income Tax Act, as amended—petitioners thus being subject to the provisions contained in Section 17 of the Gross Income Tax Act, being the Indiana Acts of 1957, Chapter 302 [Burns' Indiana Statutes Annotated (1957 Pocket Supplement), Section 64-2617.].

Prior to the effective date of said 1957 Act, the Gross Income Tax Division adopted the necessary forms and schedules as authorized by said Act which were furnished to employers, the aim being simplicity and understandability and said Division consulted with various types of employers and businesses to learn their suggestions. Plaintiffs' Exhibit No. 2, offered and read into evidence, furnished by said Division and entitled "Withholding Instructions for Indiana Gross Income Tax", not only contains instructions but also a Withholding Schedule similar to the Withholding Table furnished employers by the Federal Government for use in complying with the withholding requirements of the Federal Net Income Tax.

The application of said Chapter 302 of the Indiana Acts of 1957 will require petitioners to spend an undetermined but additional minimal time and expense in bookkeeping procedures without compensation. Petitioners admitted that the Gross Income Tax withholding procedure looked simple and believed it would not take too much time.

Petitioners comply with the requirements of the withholding provisions of the Federal Net Income Tax and Social Security Laws, the constitutionality of which they have never challenged. Petitioners already hire a bookkeeper, which would not be necessary if it were not for the requirements of withholding tax laws.

The trial court denied the injunctive relief which the petitioners sought, which said decision was affirmed by the Indiana Supreme Court.

ARGUMENT

Throughout the petitioners' Petition for Writ of Certiorari, they have repeatedly construed the Indiana Acts of 1957, Chapter 302, as imposing upon them "and other employers the requirement to serve as a tax collector, computing and collecting the amount of tax determined by the plaintiff to be due from each employee, withholding it from their pay, and paying it to the State, which constitutes involuntary servitude * * *". (p. 4) Since it is possible to infer from the choice of language used by petitioners that the Indiana statute is something other than the ordinary withholding tax provision, it should be emphasized and is clearly seen from a reading of the Act (Appendix herein) that the employer's function is to collect that portion of the employee's gross income tax liability attributable *only* to wages paid by the employer over which such employer has control. The statute imposes no obligation on the employer to compute, collect and withhold from such wages other possible gross income tax liability of the employee attributable to the employees' gross income derived from other sources. Thus, the withholding process is confined solely to and an incident of conducting business by an employer, who is the source of the only income to which the withholding provisions of the Act are applicable. Therefore, although petitioners' description of this Act might be otherwise understood, the Indiana Act and its effect upon and requirements of the employer are substantially similar to other ordinary withholding tax laws and procedures, both in the Federal and other State Governments.

I.

The Question Presented Is Not New

The petitioners state (pp. 5, 6): "This question has never been before the Supreme Court of the United States, nor before any other courts, so far as we can find." Notwithstanding this broad assertion, the question of the constitutionality of the withholding provisions of various types of taxing statutes has been before this Court and the courts of last resort of several States on a number of occasions. Some of these cases involve the collection of gasoline tax, or other use taxes, or the collection of the Federal admissions tax, or the withholding of the Federal Social Security tax. However, in all such cases exists the pattern of some person, firm or corporation either collecting or withholding the tax liability of another person.

In the field of Federal Social Security legislation is *Abney v. Campbell* (1953), 206 F. (2d) 836. In said case, the complainant was specifically asserting (p. 841):

> "• • • that the Act violates the Thirteenth Amendment by imposing involuntary servitude upon an employer of domestic servants • • •."

The Court there stated (p. 841):

> "• • • There is no suggestion, in the law, of the imposition of a servitude, there is merely a requirement that as to the tax due by domestic employees on account of the wages paid them by their employer, the employer must withhold the amount fixed by law and account it to the United States. The enforcement of the act is not the imposition of a servitude. It is the collection of a tax and the enforcement of an obligation, which under settled federal law appellants may be and are law-

> fully subjected to. From our holding that the taxes and burdens imposed are valid, it must follow that the enforcement of the law imposing them is not, it cannot be, a violation of the Thirteenth Amendment."

However, notwithstanding said case involved a Federal statute and the alleged violation of a provision of the Federal Constitution, it should be noted that this Court denied certiorari in the *Abney v. Campbell* case on January 4, 1954 as appears in 346 U. S. 924. The Abney v. Campbell case alone is sufficient to refute petitioners' assertion that the question has never been before this Court or any other Court; further, said case is peculiarly applicable by reason of the fact that the complainants were relying specifically upon the Thirteenth Amendment to the United States Constitution.

Further, in the field of state gasoline use taxes is the case of *Pierce Oil Corp. v. Hopkins* (1924), 264 U. S. 137, 44 S. Ct. 251, 68 L. Ed. 593, which held a withholding provision of Arkansas not violative of the due process clause, notwithstanding it "subjects the seller to an appreciable expense."

In the field of Federal Admission Taxes are the following cases sustaining the withholding principle:

Allen v. Regents (1938), 304 U. S. 439, 58 S. C. 980, 82 L. Ed. 1448, and
Wilmette Park Dist. v. Campbell (1949), 338 U. S. 411, 70 S. Ct. 195, 94 L. Ed. 205.

Reference is further made to footnote four of the Opinion of the Indiana Supreme Court in this case. See: Petition for Writ of Certiorari (p. 12), wherein the Indiana Supreme Court has cited sixteen decisions upholding the

validity of the withholding or collection of tax due from others. Since this list of citations is contained within the Opinion of the Indiana Supreme Court at the conclusion thereof, in the interest of brevity, this list will not here be repeated.

Suffice it to say, that in view of the above cited and referred-to cases there is no justification for petitioners' claim that this is a new question. Further, as to any such cases in which the question of the alleged violation of the Thirteenth Amendment was not raised, it would appear that such basis for contesting the validity of withholding tax laws was deemed so insubstantial as to be unworthy of claim or mention.

II.

The Decision Conforms to Ruling Precedent of This Court

In the Petition for Writ of Certiorari, petitioners state (p. 6): "The courts have virtually unanimously held that to compel workers to go back and resume their employment tasks, when on strike, would be to impose involuntary servitude, * * *". This quotation and other material in the petition infers that the Opinion of the Indiana Supreme Court herein contravenes ruling precedents. The illustration in the quotation is obviously not analogous to the instant question for the reason that, in the illustration about which the quotation is concerned, the workers would be performing for a private and usually profit-making business in which the worker has no interest, other than the receipt of wages. By contrast, in the instant case the withholding procedure is performed for and on behalf of sovereign

state government, in which the withholding agent has or should have a substantial interest as a citizen.

In the case of *Butler v. Perry* (1916), 240 U. S. 328, 60 L. Ed. 672, 36 S. Ct. 258, it was held that the Thirteenth Amendment was not applicable to such public duties as individuals owe the State, this Court therein stating on page 333 the following:

> "• • • It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, *such as* services in the army, militia, on the jury, *etc.* The great purpose in view was liberty under the protection of effective government, *not the destruction of the latter by depriving it of essential powers.* • • •" (Our emphasis)

The Indiana Supreme Court construed the withholding requirements as being in the nature of such public duties, not prohibited by the Thirteenth Amendment, as permitted in the case of *Butler v. Perry, supra.* The Indiana Supreme Court stated:

> "The burden imposed upon appellants by the Act here in question is not one of personal servitude, but rather one requiring of them and other persons similarly situated, the performance of certain services for the State as a public duty, in order to make the collection of the tax more uniform and thus render our State Government more effective in its efforts to avoid discrimination in the collection of gross income taxes. While not similar, yet it may be said to be in the nature of jury or military service as opposed to personal servitude."

The opinion in *Butler v. Perry, supra,* does not attempt to restrict "those duties which individuals owe to the

State'' solely to army, militia, or jury duty. Petitioners state no authority that the withholding of taxes may not be such a public duty. According to *Butler v. Perry, supra,* the Thirteenth Amendment does not deprive the State from exerting any essential power, since such a holding would tend toward the destruction of government. Thus, any power *essential* to effective government may be considered as a public duty which the State may require.

It is believed that the requirements imposed upon withholding agents may be reasonably classified as public duty which the Legislature may require under the theory of *Butler v. Perry, supra.* It is not shown that the withholding requirements of the Indiana Act are substantially dissimilar from those of other statutes previously upheld by this Court. For this reason respondents urge that the Opinion of the Indiana Supreme Court conforms with ruling precedents.

III.

The Petitioners' Claim Appears to be Both Inconsistent and Frivolous

At the hearing of this cause in the trial Court, the petitioners admitted that the withholding requirements of the Indiana statute looked simple and would not take too much time; petitioners further admitted that the required procedure and the Withholding Schedule was similar to the corresponding procedure and Withholding Table furnished employers by the Federal Government for use in withholding for Federal tax purposes. Notwithstanding this admission, the petitioners admitted that they have never challenged the constitutionality of the withholding provisions of either the Federal Net Income Tax or of the Federal

Social Security Act. Certainly the petitioners are inconsistent in complaining of the provisions of the State Act while never challenging the provisions of Federal Acts which they admit are substantially similar. Petitioners further, and prior to the effective date of the Indiana Act, already hired a bookkeeper to comply with the requirements of withholding tax laws applicable previously to the effective date of the Indiana Act. Petitioners do not urge the fact of the additional expense involved, but rather that the Indiana Act requires a compelled service. It would appear from the evidence itself, that the petitioners' contentions are inconsistent with its acquiescence in the withholding requirements of Federal taxing statutes and may be considered as contentions which are frivolous.

CONCLUSION

In view of the above and foregoing, it is urged that the petitioners' Petition for Writ of Certiorari does not contain any reasons of sufficient substance to require or merit the granting of the Writ. Therefore, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

That Section of the Indiana Gross Income Tax Law against which the petitioners' action is directed is Sec. 17, as amended, of the Indiana Gross Income Tax Law, being the Indiana Acts of 1957, Ch. 302, Sec. 1, p. 822. Said Section may also be found in Burns' Indiana Statutes Annotated, Vol. 11, Part 2 (1951 Replacement, 1957 Cum. Pocket Supp.), Section 64-2617. Said Section, in its entirety and set out verbatim, reads as follows:

> "Sec. 17. (a) Every withholding agent who employs four (4) or more persons, on a full time or part time basis, to whom income is paid which is subject to the tax imposed by this act, shall deduct and withhold from all salaries, wages, fees, bonuses and commissions payable to such persons an amount computed by the application of the rate prescribed by section 3 of this act, as amended, to that portion of such income which exceeds the proportionate part of the annual exemption, provided by section 5 of this act, as amended, attributable to the pay period for which such income is payable. The department may prescribe by regulations, duly adopted pursuant to law, such schedules, tables, conditions and procedures as may be necessary to facilitate the operation of the above withholding formula. As used in this subsection, the term 'wages' shall not include remuneration paid for domestic service or for casual labor which is not in the course of the employer's trade or business.
>
> "(b) Whenever the department shall find that any taxpayer has not, or is not, properly reporting and paying tax on income from interest, dividends or other fixed and determinable annual or periodical

gross income of whatever kind and in whatever form paid or credited, including all other gross income not included in subsection (a) of this section, which income is subject to the tax imposed by this act, the department may, by service of written notice and demand, which notice shall name such taxpayer affected, require any withholding agent to deduct and withhold from all such income due such taxpayer an amount computed by the application of the rate prescribed by section 3 of this act, as amended, to that portion of such income paid or credited, or to be paid or credited, in the calendar year, by such withholding agent to such taxpayer, which exceeds the amount of annual exemption, provided by section 5 of this act, as amended.

"(c) Every withholding agent required to deduct and withhold any tax under subsection (a) or (b) of this section shall make a return thereof on forms prescribed by the department on the last day of April, July, October and January in each calendar year reflecting the amount withheld for each taxpayer from gross income received during the quarter ending on the last day of the preceeding month and shall at the same time pay the tax thus withheld to the department. Every such withholding agent is hereby made liable for such tax, and is hereby indemnified against the claims and demands of any individual, copartnership, corporation or other entity, for the amount of any payments made in accordance with the provisions of this section.

"(d) A withholding agent, required to deduct and withhold a tax from the gross income of a taxpayer, shall furnish to such taxpayer, in duplicate, a written statement showing the amount of gross income paid by the withholding agent to the taxpayer during the preceding calendar year and the amount of the tax deducted and withheld during such calendar year. Such statements shall be in such form

and contain such information as prescribed by regulations duly adopted pursuant to law and shall be furnished to such taxpayer not later than January 31 of the year immediately following the calendar year during which the tax has been withheld.

"(e) Gross income upon which any tax is required to be withheld at the source under the provisions of this section shall be included in the return of the person entitled to receive such gross income, but any amount of tax so withheld shall be credited against the amount of tax as computed in such return. Any person, any part of whose income is subject to the withholding provisions of this section, shall file his annual gross income tax return on or before March 1 of the calendar year immediately following the year during which the tax has been withheld. One copy of the statement furnished by the withholding agent pursuant to subsection (d) of this section shall be attached to said return. Any amount withheld by such withholding agent and paid by him to the department which is in excess of the total amount of tax, interest and penalties due from the taxpayer against whom withholding has been made, shall be refunded to the taxpayer. If such refund shall be claimed by the taxpayer and shall not be allowed by the department, then the taxpayer may institute suit for the recovery of any amount so withheld which he alleges to be due him. Such suit shall be governed by the provisions of section 14A of this act.

"(f) For the calendar year 1947, and for each calendar year thereafter, each withholding agent, as defined in section 1(l) of the Gross Income Tax Act, as amended, shall deduct and withhold from all payments made for the performance of contracts within the State of Indiana by nonresident contractors, except contracts of sale, the receipt of which payments are subject to tax under the pro-

visions of this act and regulations issued and approved for the administration of this act, an amount computed by the application of the highest rate applicable to any portion of said receipts as prescribed by section 3 of this act, as amended, to that portion of such income which exceeds the amount of annual exemption, provided by section 5 of this act, as amended.

"(g) Any withholding agent, and the officers and partners thereof, violating any of the provisions of this section shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00), to which may be added imprisonment in the county jail not to exceed six (6) months. In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent statement, with the intent to defraud the state or to evade the payment of the tax imposed hereunder shall be guilty of the offense of perjury and, on conviction thereof, shall be punished in the manner provided by law. The criminal prosecution of any person or persons guilty of having violated any of the provisions of this section may be instituted by the filing of an affidavit or indictment in the same manner as other criminal cases are commenced, and the attorney general shall have concurrent jurisdiction with the prosecuting attorney in instituting and prosecuting such actions. The attorney general and/or the prosecuting attorney shall be allowed at all times to appear before the grand jury for the purpose of reporting any violations of this act, or for the purpose of rendering legal advice with respect thereto when required, or for the purpose of interrogating witnesses before the grand jury. When any affidavit charging any person with a violation of any of the provisions of this section has been made as provided for by law, either

the attorney general or the prosecuting attorney shall approve the same by indorsement, using the words 'approved by me' and by signing the same as attorney general or prosecuting attorney."

The term "withholding agent" is defined in Section 1(l), as amended, of the Indiana Gross Income Tax Law, being the Indiana Acts of 1957, Ch. 315, Sec. 1, page 925. Said Section may also be found in Burns' Indiana Statutes Annotated, Vol. 11, Part 2 (1951 Replacement, 1957 Cum. Pocket Supp.), Section 64-2601(l). Said subsection 1(l), *in its entirety and set out* verbatim, reads as follows:

"(l) The term 'withholding agent' means any person and includes all individuals, corporations, associations, firms, companies and partnerships in whatever capacity acting, including lessees or mortgagors of real or personal property, agents, fiduciaries, employers, the State of Indiana, and all officers and employees of the state, or of any municipal corporation or political subdivision of the state having the control, receipt, custody, disposal or payment of interest, dividends, rentals, salaries, wages, premiums, annuities, compensations, principals, remuneration, emoluments, and all fixed or determinable gross income taxable under this act, including payments for the performance of contracts within the State of Indiana and receipts from the sale of any personal property sold in the State of Indiana."